

UGANDA / JUDGMENT

Masereka v Muhindo (Divorce Appeal No. 8 of 2017) [2023] UGHCFD 3 (6 February 2023)

[2023] UGHCFD 3

COURT

HC: Family Division (Uganda)

BEFORE

Wagona, J

CASE / FILE NUMBER

Divorce Appeal No. 8 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

DIVORCE APPEAL NO. 008 OF 2017

(ARISING FROM KASESE CHIEF MAGISTRATE'S COURT AT BWERA, 5 DIVORCE
CAUSE NO. 002 OF 2017)

MASEREKA K. N. ELIA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MUHINDO A. BINYINYI ::::::::::::::::::::::::::::::::::: RESPONDENT BEFORE: HON, JUSTICE
VINCENT WAGONA

10 JUDGMENT

The appellant being aggrieved with the decision and decree of His Worship Murangira Hillary Atanzio, Magistrate Grade One in the Chief Magistrate's Court of Kasese at Bwera delivered on 1st June 2017 lodged this appeal challenging the said decision and asked court to have the same set aside.

15 The appellant framed the following grounds or objections to the said decision thus;

- 1. The Learned trial Magistrate erred in law and fact when he held that the appellant herein be paid 500,000/= to enable him start a new life.

- 2. The learned trial magistrate erred in law and fact when he ordered that parties should share the only two properties of all properties they 20 acquired during marriage.
- 3. The trial magistrate erred in law and fact when he held that the appellant shall vacate the properties upon payment of Ugx 500,000 to him by the respondent.
- 4. The learned trial magistrate erred when he failed to properly evaluate 5 the fact that the parties herein are husband and wife thus coming to a wrong decision of paying 500,000 to the appellant.

The Appellant was represented by Counsel Guma Davis Banda of M/s Guma & Co. Advocates. After lodging the appeal, the registrar authored a letter calling for the lower court record which was received by the High Court on 7th December 2017. 10 Since then, the appellant had not made efforts to have the appeal heard. I have thus considered the appeal and the lower record in coming up with this judgment. I shall first address the effect of the consent.

The respondent filed petition on the 14th March 2017 against the appellant for nullification of the marriage between the two and sharing of the properties that the 15 two acquired during the subsistence of their marriage. The Appellant was served with the petition per the affidavit of service deposed by Muhindo Oniziforo, a process server attached to Kasese Chief Magistrate's Court at Bwera dated 4th July 2017. The matter was later fixed for mention on 30th March 2017 whereby court was informed that the Respondent got an accident and that the case could not proceed and the matter was accordingly adjourned to 20th April 2017. On 20 20 th April 2017, the record is silent on what happened and the matter again came up in court on 1 st June 2017 where the parties informed court that they had consented.

The trial magistrate recorded down the terms of their consent as follows:

2 | Page

- *(a) Parties have agreed to share the only 2 properties acquired during the marriage i.e land at Bukangara Village, Bukangara Parish, Nyakiumba Sub County, Kasese Distruct.*
- *(b) That the Respondent shall take land at Bukangara village,* 5 *Bukangagra Parishn and the applicant shall take land/lock up at Kikumbi Village, Bukangara Parish.*
- *(c) In addition, the Applicant shall pay 500,000/- to the Respondent by 29th June 2017 to enable him start a new life.*
- *(d) The respondent upon being paid 500,000/= shall vacate the Applicant's*

10 *properties.*

- *(e) Each party shall bear his/her own costs.*
- *(f) the consent judgment is translated to the parties in Lhukonzo language before signing.*

There is on record a formal consent judgment dated 1st June 2017 signed between 15 the Appellant and the Respondent on terms reduced down as above by the trial Magistrate and endorsed by court. The Appellant being aggrieved by the consent judgment dated 1st June 2017 lodged the appeal at hand.

CONSIDERATION BY COURT:

A consent judgment represents a voluntary understanding between parties to a 20 dispute on settlement of the same which is sanctioned by court. A consent settlement once endorsed by court, becomes a judgment of court which is binding on both parties to a dispute.

In **Hirani Vs Kassam (1952) 19 EACA 131**, court adopted and approved the following passage from Seton of Judgments & Orders, 7th Edn. Vol 1 p. 124:

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them --- and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court --* 5 *- or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement."*

A consent judgment/decree is passed on terms of a new contract between the parties 10 to the consent judgment and the same can only be set aside on terms that invalidate a normal contract.

See: Brooke Bond Liebig (T) Ltd vs. Mallya (1975) EA 266 and Mohamed Allibhai vs. W. E. Bukenya& Another, SCCA No. 56 of 1996.

In **The Attorney General and the Uganda Land Commission v James Kamala, Civil Appeal No. 08 of 2004**, it was observed that consent judgments are treated as

15 fresh agreements and may only be interfered with on limited grounds such as illegality, fraud or mistake. The very narrow circumstances where a consent judgment may be challenged confirm that such a judgment acts as a final decision.

I find that once the consent settlement was reduced in writing and signed by the parties and the terms thereof are confirmed by the court in the presence of the parties 20 and endorsed, the same became binding and can only be set aside on terms that

- invalid a contract.

The supreme court of India in **Seree Surya Developers & Promoters Vs. N. Saileh Prasad & others, Civil Appeal No. 439 of 2022**, Shah J observed in relation to the above thus:

"Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will* 5 *itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made"

Further in *Pushpa Devi [Pushpa Devi Bhagat v. Rajinder Singh, (2006) 5 SCC 566* it was observed thus:

"This Court held that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on* 15 *the basis of any such agreement or compromise, it is that court and that court alone which can examine and determine that question." emphasis added.*

The same position was given *Triloki Nath Singh v. Anirudh Singh, (2020) 6 SCC 629,* where the court noted thus;

"..the only remedy available to a party to a consent decree to avoid such* 20 *consent decree is to approach the court which recorded the compromise and separate suit is not maintainable.*

In the case before me, the appellant sought to challenge the terms of the consent by way of an appeal. Premised on the above authorities, it is my view that the Appellant

has no right of appeal against the consent judgment. If he is aggrieved with the same, the remedy available to him is to apply to have the same set aside citing the terms that invalid a contract in a court that endorsed the consent.

This Appeal is therefore incompetent before this court and it is accordingly 5 dismissed with no orders as to costs since the appeal was not defended by the Respondent. I also strike out Misc. Application No. 58 of 2017 for stay of execution pending the determination of the appeal since the same cannot stand after the dismissal of the appeal.

It is so ordered.

Vincent Wagona

High Court Judge

Fort-portal

6.2.2023

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